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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 651.

THE GREYHOUND CORPORATION,
Petitioner,

vs.

G. C. MARTIN,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioner, The Greyhound Corporation, seeks the issuance of a writ of certiorari to review an order and judgment entered by the United States Court of Appeals for the Sixth Circuit, which order and judgment reversed the action of the United States District Court for the Middle District of Tennessee in sustaining petitioner's motion for a summary judgment.

OPINIONS BELOW.

The opinion of the United States District Court for the Middle District of Tennessee is reported in 125 F. Supp. at page 362, and a copy of the same may be found as an appendix to this brief. The opinion of the United States Court of Appeals for the Sixth Circuit has not yet been reported, but may be found as an appendix to this brief.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 2, 1955, and the jurisdiction of this Court was invoked under the provisions of Title 28, Section 1254 (1) of the United States Code.*

QUESTION PRESENTED.

The petition for certiorari (Petition, 2-3) states that only one question is presented to this Court for review—"Where a passenger, the dependent of an employee of the carrier, is injured in an interstate journey while riding on a trip pass containing a limitation of liability is such pass rendered other than a 'free pass' as the term is used in the Hepburn Act [49 U. S. C. A., Section 1 (7)] so as to avoid the limitation of liability because the carrier has previously agreed in its Labor Union Contract to issue certain trip passes to the dependents of its employees?"

However, petitioner states in a footnote (Petition, 3) that additional questions are presented which should be ruled upon by this Honorable Court, but that "such ques-

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* The jurisdiction of the District Court was based upon diversity of citizenship, 28 U. S. C. 1332 (a) (1).

tions are not relied upon by petitioner as a basis for the granting of the writ."

The summary judgment of the District Court was set aside by the United States Court of Appeals on two grounds. It held, in substance, that the allegations contained in the complaint established that the deceased, Mrs. Martin, was a passenger for hire because the petitioner was obligated to issue the pass to Mrs. Martin pursuant to a bargaining agreement and therefore held that the stipulations attempting to limit the liability of the carrier are void. The United States Court of Appeals further held that the summary judgment should be set aside on another ground, namely, that the allegations of the complaint were sufficiently specific to present an issue of wilful, wanton, or gross negligence and that a carrier may not relieve itself from liability for such fault by stipulations attempting to waive its liability (Appendix, 18-23).

The United States Court of Appeals did not pass upon question number two (Appellant's Brief Below, 10; Appellee's Brief Below, 3) which was presented to that Court by both parties as follows:

> "In view of the uncontradicted allegations contained in the complaint and affidavit of appellant, was the District Court authorized to make a finding that the 'trip pass' was issued gratuitously and upon such finding sustain the motion for summary judgment?"

Respondent contends that this question should have been answered in the negative because the purpose of the summary judgment procedure is to eliminate a trial **where only questions of law are involved. Fountain v. Filson,** 336 U. S. 681. Whether the pass was issued to Mrs. Martin gratuitously, or whether it was issued for a valuable consideration, is a factual question. **South P. Co. v. Schuyler,** 227 U. S. 601.

STATEMENT OF THE CASE.

Respondent brought this action against the petitioner for damages for the wrongful killing of respondent's wife, Dorothy Martin, while riding on a bus of the petitioner, who owns and operates a bus system as a common carrier in practically all of the United States (Appellant's Appendix Below, 6a-7a).

It was alleged in the complaint that respondent was an employee of the petitioner and had been for a number of years. During the month of September, 1952, respondent, pursuant to a collective bargaining agreement and in accordance with respondent's contract of employment, requested and was issued "trip passes" entitling respondent and his wife to passage from Nashville, Tennessee, to Jacksonville, Florida, and return. At the same time respondent purchased passenger tickets to be used by himself and his wife from Jacksonville, Florida, to Miami, Florida and return (Appellant's Appendix Below, 7a-8a).

The record is undisputed that petitioner was obligated to issue to Mrs. Martin the pass pursuant to the bargaining agreement.

Respondent also alleged that on the morning of September 22, 1952, respondent and his wife boarded one of petitioner's buses in Nashville en route to Florida. He alleges that upon reaching a point within the State of Alabama, north of Birmingham, and while the bus was being driven at an unreasonable rate of speed in a reckless and careless manner, with a defective front tire, the tire blew out and the bus rolled down an embankment causing Mrs. Martin to suffer severe injuries, which injuries eventually caused her death. Respondent also charged that the accident resulted from the reckless speed of the bus at a time when the petitioner knew, or should have known, that the right

front tire was in a defective condition. Respondent also charged that petitioner's want of care raised the presumption of conscious indifference to consequences and that petitioner was guilty of gross, wanton and wilful negligence in that it drove said bus at a fast rate of speed at a time when it knew or should have known that one of its tires was in a defective condition and that defendant, notwithstanding such knowledge, in order to save money, removed better and more expensive tires and placed thereon tires that were likely to puncture or blow out under certain atmospheric conditions (Appellant's Appendix Below 8a-10a).

The petitioner filed an answer (Appellant's Appendix Below 17a-21a) and thereafter filed a motion for summary judgment (Appellant's Appendix Below 22a), together with an affidavit in support thereof (Appellant's Appendix Below, 23a-24a).

Respondent filed an affidavit opposing the motion for summary judgment (Appellant's Appendix Below, 25a-28a). The District Court sustained the motion for summary judgment (Appellant's Appendix Below 29a-33a); and respondent appealed to the United States Circuit Court for the Sixth Circuit, where the judgment of the District Court was reversed and the case remanded to the District Court for the trial of the case upon its merits (Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, Appendix, 17-23).

ARGUMENT.

Both the pleadings and affidavit of the respondent established that the "trip pass" was issued to Mrs. Martin for a valuable consideration and was not issued to her gratuitously. **As found by the District Court, the United States Court of Appeals, and admitted by petitioner in its statement of the question involved, the pass was issued to Mrs. Martin pursuant to a collective bargaining agreement between petitioner and respondent.**

The collective bargaining agreement (Exhibit A to respondent's affidavit, Appellant's Appendix Below, 26a, 27a-28a) referred to the passes to be issued to be "trip passes" and did not refer to them as "free passes" and the pass filed as Exhibit 1 to the affidavit of Gordan Haralson by petitioner is designated on the front thereof as a "trip pass". Only in the stipulation on the back of the pass is the term "free pass" used. It is well settled that the mere designation of a pass as "a free pass" does not constitute it a gratuity. **New York Cent. R. Co. v. Mohney,** 252 U. S. 152; **Norfolk Southern R. Co. v. Chatman,** 244 U. S. 276; **Grand Trunk R. Co. v. Stevens,** 95 U. S. 655; **Tripp v. Michigan Cent. R. Co.,** 6 Cir., 238 F. 449; **Sassaman v. The Pennsylvania R. Co.,** 144 F. 2d 950.

In view of the collective bargaining agreement petitioner did not have the choice to grant or withhold the pass to Mrs. Martin but was bound by a contractual obligation to issue it. Mrs. Martin was a third party beneficiary and the pass was part of respondent's compensation. Such a benefit is quite analogous to the cases of pension plans, hours and conditions of work, health and accident insurance plans, social security, paid vacations, hospitalization, Christmas bonuses, etc., granted to employees in collective bargaining agreements. These benefits are not "gratuities" but constitute wage and working

conditions within the meaning of the Labor Management Relations Act and are proper subjects for the collective bargaining. Labor Management Relations Act, Title 29, Sections 141, 152.

The Labor Management Relations Act, pursuant to which governmental regulation the bargaining agreement was entered into between petitioner and respondent, was passed by Congress for the manifest purpose of permitting employer and employee to enter into binding agreements concerning wages, etc., to encourage the "free flow of commerce . . ." Title 29, U. S. C. A.; Sec. 151.

Petitioner insists that the issuance of a pass by a carrier to be used in interstate commerce and issued otherwise than a free pass, both in form and in substance, is prohibited by the Hepburn Act.

This argument of petitioner is unsound for several reasons. **First,** this defense was not made either in its motion for summary judgment or the answer of petitioner which was filed in the United States District Court. **Second,** the question whether or not this section of the Hepburn Act has been violated is a factual question and should not be disposed of by a motion for summary judgment. **Third,** as the United States Court of Appeals held "there should be no difficulty in equating the value of the pass to the published tariff, in compliance with § 317 (b) of the Hepburn Act." (Opinion, Appendix, 22.) This is also a factual matter to be determined by a trial of the case.

Fourth, petitioner is estopped to urge this defense. **Norfolk Southern R. Co. v. Chatman,** 244 U. S. 276. **In the case at bar petitioner admits that it made a contract to issue such a pass that was issued to Mrs. Martin. Therefore, petitioner should not be allowed at this time to urge that it issued such a pass unlawfully.** Even if the pass was issued unlawfully and in violation of the Hepburn Act,

Mrs. Martin, by accepting the pass in good faith, was entitled to safe passage from the carrier.

Petitioner, on page 6 of its petition, charges that the opinion of the United States Court of Appeals for the Sixth Circuit is in conflict with the opinions of this Honorable Court rendered in the cases of **Northern Pacific Railway Company v. Adams**, 192 U. S. 440; **Charleston & W. C. Railway Company v. Thompson**, 234 U. S. 576; **Kansas City Southern Railway Company v. Van Zant**, 260 U. S. 459, and **Francis v. Southern Pacific Co.**, 333 U. S. 445. It is the position of respondent that the opinion of the United States Court of Appeals is not in conflict with those decisions.

In the case of **Northern Pacific Railway Company v. Adams**, supra, a free pass both in form and in substance was issued to Adams by the railroad company which contained a stipulation limiting its liability. This case was decided prior to the enactment of the Hepburn Act. Furthermore, this Honorable Court observed in that case that, "So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make . . . ." This Court also held that the passenger was a free passenger, "paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in **New York C. R. Co. v. Lockwood**, 17 Wall. 357, 21 L. ed. 627, and **Grand Trunk R. Co. v. Stevens**, 95 U. S. 655, 24 L. ed. 535." This Court also expressly held in the case of **Northern Pacific Railway Company v. Adams**, that "the question, then, is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employees, who at the time is riding on a pass

given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence."

In the case of **Charleston & W. C. Railway Company v. Thompson,** 234 U. S. 576, this Honorable Court held that it was a case involving a "free pass," both in form and substance, in that it was issued to the passenger gratuitously which exempted the company from liability, "the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906 * * *" Mr. Justice Holmes, in delivering the opinion of this Honorable Court, stated that "the railroad was under no obligation to issue the pass."

In the case of **Kansas City Southern Railway Company v. Van Zant,** 260 U. S. 459, this Honorable Court was called upon to determine the effect of a condition of a free pass issued by the railroad company to a person for use in transportation in interstate commerce and to determine whether the case was controlled by the provisions of the Hepburn Act or by the laws of Kansas and Missouri. This Honorable Court found from the facts that the pass was issued gratuitously pursuant to the Hepburn Act and held therefore that the question would be regulated by the Hepburn Act and that the state control over the subject was excluded.

In the case of **Francis v. Southern Pacific Company,** 333 U. S. 445, this Honorable Court dealt with a case which was brought in the United States District Court. This Court found that the trial court submitted the case to the jury only on the question of wanton and gross negligence. This Court reaffirmed its former opinions in the Thompson case and the Van Zant case and held that the liability of an interstate carrier to one riding on a pass issued gratui-

tously pursuant to the Hepburn Act was to be determined not by the state law but by the Hepburn Act and therefore the Federal law should apply and not the law of the state involved.

In view of the foregoing it is respectfully submitted that the opinion of the United States Court of Appeals for the Sixth Circuit is not in conflict with the aforesaid opinions of this Honorable Court. According to the uncontradicted allegations of the complaint and affidavit of respondent the "trip pass" was issued to Mrs. Martin for a valuable consideration and was not issued to her gratuitously, pursuant to the Hepburn Act. Such a transaction is not prohibited by the provisions of the Hepburn Act and Mrs. Martin was therefore riding as a passenger for hire, thereby rendering null and void the stipulation on the back of the pass. **New York Cent. R. Co. v. Mohney,** 252 U. S. 152; **Norfolk Southern R. Co. v. Chatham,** 244 U. S. 276; **Grand Trunk R. Co. v. Stevens,** 95 U. S. 655; **Tripp v. Michigan Cent. R. Co.,** 6 Cir., 238 F. 449; **Sassaman v. The Pennsylvania R. Co.,** 144 F. 2d 950.

Furthermore, the petition should be denied because the District Court should not have entered a summary judgment in view of the allegations that petitioner was guilty of gross negligence. **New York Cent. R. Co. v. Mohney,** 252 U. S. 152; **Virginia Beach Bus Line v. Campbell,** 73 F. 2d 97, cert. den., 294 U. S. 728. On an appeal from an order granting a motion for summary judgment the Circuit Court of Appeals was required to give appellant the benefit of every doubt, and all reasonable intendments and inferences from pleadings and exhibits are, as a matter of law, to be taken against the movant for summary judgment and in favor of the opponent. **Purity Cheese Co. v. Frank Ryser Co.,** 153 F. 2d 88; **National Labor Relations Board v. Weirton Steel Co.,** 146 F. 2d 144; **Ramsoner v. Midland Valley R. Co.,** 135 F. 2d 101.

CONCLUSION.

In view of the fact that petitioner entered into a valid bargaining agreement pursuant to the Labor Management Relations Act and agreed for a valuable consideration to issue a pass to respondent's deceased wife, and did in fact issue the pass to Mrs. Martin pursuant to the contract; and in view of the fact that the allegations contained in the complaint and affidavit of respondent are uncontradicted, a motion for summary judgment should not be entered and this case should be allowed to be remanded to the District Court for a trial upon its merits.

It is therefore the contention of respondent that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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APPENDIX.

In the
DISTRICT COURT OF THE UNITED STATES
For the Middle District of Tennessee,
Nashville Division.

G. C. Martin,
Plaintiff,
vs.
The Greyhound Corporation,
Defendant.
Civil.
No. 1728.

"Judgment.

(Received for Entry Oct. 25, 1954.)

This is an action for damages filed by plaintiff, G. C. Martin, whose wife was injured while riding on a bus belonging to the defendant, Greyhound Corporation, from which injuries she subsequently died. The matter is before the Court upon a motion for summary judgment filed by said defendant.

The basis of defendant's motion is that plaintiff's wife was riding on defendant's bus pursuant to a pass issued to her which provided, in part, as follows:

> 'In consideration of receiving this Free Pass, each of the persons named thereon, in using same, voluntarily assumes all risks of accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss, or injury to his or her property; and that, as for him or her, in the use of this pass he or she will not consider the Company as a Common Carrier, or liable to him or her as such.

'And as a condition precedent to the issuing and use thereof, each said person represents that he or she is legally entitled to such free transportation under all laws governing the same, and agree that he or she will not use this pass in violation of any law.'

Plaintiff contends that the pass was not a gratuity and that the limitation of liability is, therefore, not enforcible for the reason that said pass was specifically provided for and issued pursuant to a labor contract wherein the defendant agrees as part of its employment contract that its employees would be entitled to passes for themselves and certain members of their families, as provided for therein.

The contract between defendant and the union also contained the following provisions relative to the issuance of passes:

'Issuance of passes provided herein shall be subject to any governmental regulations covering same. Passes shall be subject to load capacities at all times. Employees riding on passes shall not occupy seats to the exclusion of revenue passengers. Employee passes shall not be honored for commutation to and from work.'

Plaintiff relies upon the case of Sassaman v. Pennsylvania R. Co., 144 F. 2d 950, which held that a pass issued to a train dispatcher partly in lieu of additional pay that would otherwise be required to cover dispatcher's transportation cost to and from work, was not a prohibited 'gratuity' within the Hepburn Act, and hence dispatcher occupied the status of a 'passenger for hire' and a release of employer's common law liability for negligence printed on the pass, similar to the one in the present case, was void, notwithstanding the dispatcher could have used the pass for riding for pleasure.

In the instant case, plaintiff's wife was making a pleasure trip from Nashville, Tennessee, to Jacksonville,

Florida. She was not employed in any way by the defendant company and was not on any business of the company. While it is true that the pass was issued pursuant to the labor contract, yet it was issued subject to any governmental regulations covering same, and the pass itself provided that it was not to be used to the exclusion of revenue passengers but would only be honored between such points as available space would permit. Plaintiff's wife clearly could not be said to have occupied the status of a 'passenger for hire' while using said pass under said circumstances, and the court is of the opinion that, even though issued pursuant to a labor contract, the pass was still a gratuity, and plaintiff was bound by the stipulation limiting liability of the carrier.

The Court is, therefore, of the opinion that the motion filed by defendant for a summary judgment should be granted.

Judgment will be entered accordingly.

This 25th day of October, 1954.

/s/ Elmer D. Davies,
United States District Judge."

In the
DISTRICT COURT OF THE UNITED STATES,
For the Middle District of Tennessee,
Nashville Division.

G. C. Martin
v.
The Greyhound Corporation.
Civil
No. 1728.

Final Summary Judgment.

This cause came on to be heard on the motion of the defendant, The Greyhound Corporation, for a summary judgment as authorized by Rule 56 of the Federal Rules

of Civil Procedure; and it appearing to the Court from the entire record that the material facts are that the plaintiff's wife was riding on defendant's bus pursuant to a pass issued to her under which she agreed that the defendant, The Greyhound Corporation, would not be liable for any accident, and that said pass was a gratuity, and the limitation of liability was therefore enforceable so that the defendant, The Greyhound Corporation, is entitled to a judgment as a matter of law.

And it appearing to the Court that this judgment should be declared final pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure because there is no just reason for delay.

It Is Therefore Ordered, Adjudged and Decreed that a final summary judgment be entered in favor of the defendant, The Greyhound Corporation, and against the plaintiff, G. C. Martin, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure because there is no just reason for delay, therefore finally dismissing the complaint of the said G. C. Martin as to the defendant, The Greyhound Corporation, with costs.

Dated this November 10th, 1954.

Elmer D. Davies,
United States District Judge.

Approved as to form:

Kenneth Harwell,
Attorney for Plaintiff, G. C. Martin.

K. Harlan Dodson, Jr.,
Attorney for Defendant, The Greyhound Corp.

William J. Harbison,
Attorney for Defendant, The Goodyear Tire & Rubber Co., Inc.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Cause Argued and Submitted October 13, 1955—Before Simons, Allen and Miller, Circuit Judges.

This cause is argued by Kenneth Harwell for appellant and by Harlan Dodson for appellee and is submitted to the court.

Judgment.

(Filed December 2, 1955.)

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded to the District Court for trial of the case upon the merits.

Opinion.

(Filed December 2, 1955.)

No. 12395.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

G. C. **Martin,** Appellant,	}	Appeal from the United States District Court for the Middle District of Tennessee.
v.		
The Greyhound Corporation, Appellee.		

Decided December 2, 1955.

Before Simons, Chief Judge, Allen and Miller, Circuit Judges.

Simons, Chief Judge. Frustrated in his effort to submit his claim for damages to the court upon its merits, by a summary judgment in favor of the appellee, the appellant presents this appeal. The facts upon which he relies follow.

The appellant is, and since 1948 has been, an employee of the Southeastern Greyhound Lines, a division of the Greyhound Corporation. The appellee is a corporation, incorporated under the laws of Delaware, and doing business in Tennessee as a common carrier of passengers. The appellant at the time here involved was a member of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America which had entered into an employment contract with the appellee by terms of which he was entitled to have issued to him and his

family passes entitling them to passage on the bus system of the appellee. Pursuant to the terms of his employment contract, he requested, and was issued, passes entitling him and his wife to passage from Nashville, Tennessee, to Jacksonville, Florida, and return. On the morning of September 22, 1952, the appellant and his wife boarded one of the appellee's busses in Nashville, en route to Florida. He alleges that upon reaching a point within the State of Alabama, north of Birmingham, and while the bus was being driven at an unreasonable rate of speed and in a reckless and careless manner, with a defective front tire, the tire blew out and the bus rolled down an embankment, causing Mrs. Martin to suffer injuries which, eventually, caused her death. He charges that the accident resulted from the reckless speed of the bus at a time when the appellee knew, or should have known, the right front tire was defective. He charges explicitly that the appellee's want of care raises "the presumption of conscious indifference to consequences and guilty of gross and wanton negligence." The presumption arises from the rate of speed and from the fact that the appellee had replaced the safety, puncture proof tires on the bus by tires which were likely to puncture and blow out, under certain atmospheric conditions.

The appellee denied all charges of negligence and, as affirmative defenses, pointed to the terms of the passes which recited that the person named therein voluntarily assumed all risk of accident, waived liability, and represented that he would not use the pass in violation of any law. The appellee further answers that he had a contract with the Goodyear Tire & Rubber Company under the terms of which that company, as an independent contractor, agreed to furnish tires for its busses and to care for them. If any tire was defective it was due to the negligence of Goodyear and not its own, and that by selecting Goodyear to furnish and maintain its tires in service-

able condition it was exercising the highest degree of care for its passengers.

The district court adjudged that the appellant's wife did not occupy the status of a "passenger for hire," that her pass, though issued pursuant to a labor contract, was a gratuity and that appellant and his wife were bound by the stipulation limiting the liability of Greyhound. It thereupon entered a judgment dismissing the complaint. The general rule stemming from **Railroad Company v. Stevens**, 95 U. S. 655, is that a contract undertaking to exempt a common carrier of passengers from liability for negligence is void. The reasons underlying it are fully set forth by Mr. Justice Hughes in **Santa Fe T. & T. R. Co. v. Grant Brothers Construction Co.**, 228 U. S. 177, at 184, 185. There it was said that the rule rests on broad grounds of public policy, justifying restriction of liberty of contract because of the public needs to be achieved. The law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. This concept is not, however, applicable in its full sweep to gratuitous passengers since it was held in **Northern Pacific Railroad Company v. Adams**, 192 U. S. 440, that a carrier could stipulate with a gratuitous passenger against liability for ordinary negligence. Although the decisions are not in complete agreement, it is, generally, held that a carrier cannot by such stipulations relieve itself from liability for acts done wantonly or wilfully, or for acts of gross negligence. **New York Central Railway v. Mohney**, 252 U. S. 152.

This brings us to the principal issue in the case and, so to a consideration as to whether the appellant and his wife were "passengers for hire" or whether the passes constituted "gratuities." The appellee leans heavily upon **Charleston & Western Carolina R. Co. v. Thompson**, 234 U. S. 576. But there, Mr. Justice Holmes pointed out that

the railroad was under no obligation to issue the pass. The appellee was under such an obligation. The union agreement with Greyhound provided that its members were entitled to receive trip passes for themselves and their families for such trips as seemed reasonable to the company. The fact that the passes were issued eliminates any question as to their reasonableness. The obligation of the appellee was fixed by its union contract. The passes were in a real sense part of the compensation paid to appellant as member of the union.

The appellee relies upon § 1, par. (7) and § 317 (b) of the Hepburn Act, Tit. 49, U. S. C. A. The first prohibits, with numerous exceptions, the free transportation of passengers by common carriers. Within such exceptions, as recipients of passes, are the carriers' employees and their families. The second provides that no common carrier by motor vehicle shall charge, demand, collect or receive a greater or less, or different, compensation for transportation than is provided in its published tariffs in effect at the time. **Charleston & Western Carolina Railway Co. v. Thompson,** supra, held that a pass issued to a member of the family of an employee of a railroad company is **free** under the provision of the Hepburn Act permitting it to be issued and, in consequence, a stipulation contained in it, exempting the company from liability in case of injury, is valid. The main question in that case was, therefore, said to be "whether when the statute permits the issue of a free pass to its employees and their families it means what it says." As the pass was free under the statute, there is no question of the validity of its stipulation. That case must, however, be considered in the light of its specific facts, the court's rationalization in respect to them, and whether in actuality, as in name, the pass is **free.**

Norfolk Southern Railroad Company v. Chatman, 244 U. S. 276, demonstrates that the mere designation of a

pass as **free** does not constitute it a gratuity and, so, in the case of livestock contracts, providing for the transportation of caretakers on free passes, such passes were held not to be **gratuities** issued without consideration. Similar was our own holding in **Tripp v. Michigan Central Railroad Company**, 238 Fed. 449. The Supreme Court in **Chatman** distinguished from the **Thompson** case because behind the pass there involved lay no such background of court decision and railroad practice, giving definite interpretation to the statute, in respect to caretaker passes. The teaching of **Chatman** is that the designation of a pass as **free** does not, of itself, make it a **gratuity.**

We have behind the passes issued in our case no such background of court decision and practice as was reviewed in **Chatman**, neither do we have here any "improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee" as rationalized in Thompson. Here is a specific written contract between the employer and employee, supported by a recognizable consideration, which dispels all possible speculation and denies the character of the pass as a **gratuity.** Moreover, the problem, as here presented, arises in an era of social, economic, and legal change which has mitigated harsh technical defenses to suits for recovery for negligent injury, have given new values to employee benefits, and new sanctions to their denial. Like all other so-called "fringe benefits," including hours and hospitalization, etc., the issue of passes is also subject to collective bargaining, and, like other benefits, is a thing of value, subject, no doubt, to the revenue laws when received. There should be no difficulty in equating the value of the pass to the published tariff, in compliance with § 317 (b) of the Hepburn Act. Such climate should and has conditioned interpretation when interpretation is reasonably indicated to effectuate the Congressional purpose.

We are not here concerned with Alabama law. The free pass provisions of the Hepburn Act constitute a regulation of interstate commerce. The Greyhound was a common carrier in interstate commerce and the passes were granted for an interstate trip. The issue as to whether the appellant and his wife were "passengers for hire" is to be resolved by federal and not by state law. It is not of any importance that the appellant's wife was not an employee of Greyhound if the passes were not gratuitous.

We think the summary judgment should be set aside also on another ground. The allegations of the complaint are sufficiently specific to present an issue of willful, wanton, or gross negligence. If our view of the law is sound to the end that a carrier may not relieve himself from liability for such fault by stipulations, waiving liability, an issue of fact was presented which should be tried.

Reversed and remanded to the district court for trial of the case upon its merits.